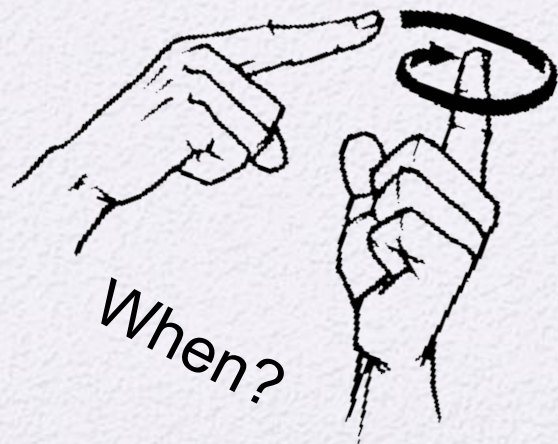


PRESCHOOL AND FAPE: *A Legal Perspective*

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The Law In Your Land

U.S. Supreme Court



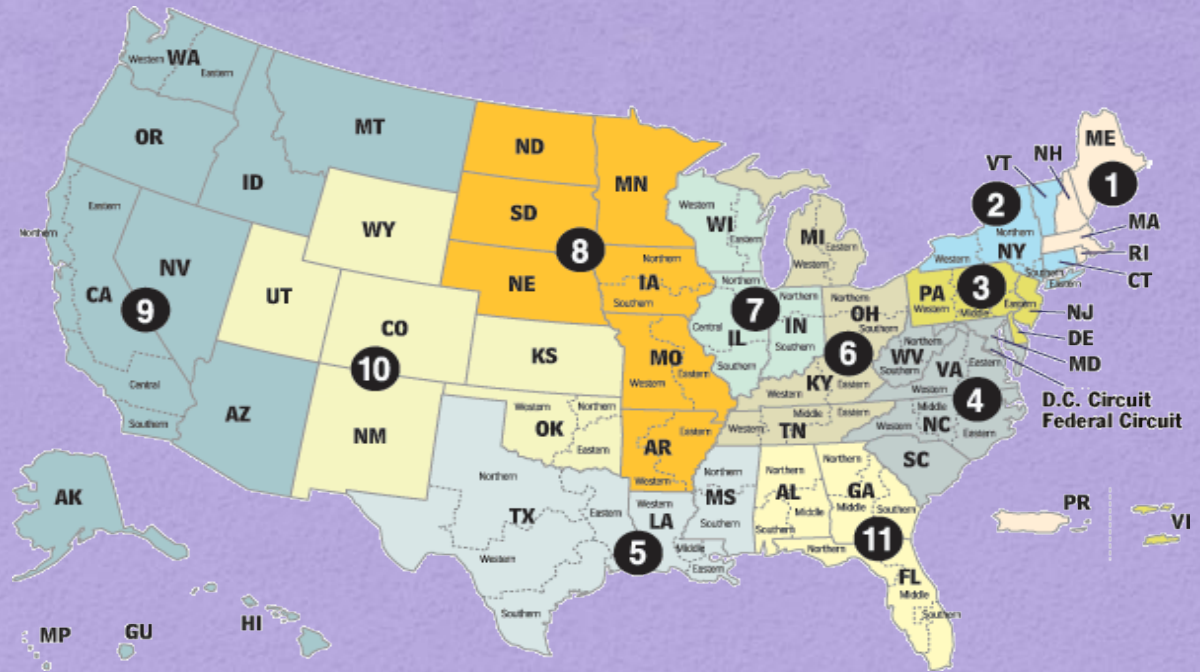
Circuit Courts of Appeal



U.S. District Courts



SEA Decisions



Who is an Eligible Child?

- A child with a disability means a child evaluated in accordance with this part as meeting eligibility criteria for one of the IDEA disability categories, **AND** who, by reason thereof, needs special education and related services.
- 34 C.F.R. §300.8(a)

Part B

- Each public agency must conduct a **full and individual initial evaluation** before the initial provision of special education and related services.
- 34 C.F.R. §300.301

Initial Evaluation

- The public agency must ensure that the child is assessed in all areas related to the suspected disability, including if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.
- 34 C.F.R. §300.304(c)(4)

Comprehensive Requirement

- In evaluating a child with a disability, the public agency must ensure that the evaluation is sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category in which the child has been classified.
- 34 C.F.R. §300.304(c)(6)

It is a 2-Prong Test !

IDEA Disability

Criteria for one of the IDEA disabilities must be met, including demonstration that the disability “adversely affects a child’s educational performance.”

Need Special Education

Once a disability is established, the child must, by reason of the disability, need special education and related services.

34 C.F.R. §300.8

What is Special Education?

- Special education means **specially designed instruction**, at **no cost** to the parents, to meet the unique needs of a child with a disability, including –
 - Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education.
- See 34 C.F.R. §300.39.

What is Specially Designed Instruction?

- Specially designed instruction means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction **to address the unique needs of the child that result from the child's disability**, and ensure access to the general curriculum.

What is a Related Service?

- Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education.
- *See 34 C.F.R. §300.34*

Limitation

- If it is determined, through an appropriate evaluation, that a child has one of the disabilities identified, **but only needs a related service and not special education**, the child is not a child with a disability under this part.
- 34 C.F.R. 300.8(a)(2)

Limitation

- A child **must not** be determined to be a child with a disability under this part if the child does not otherwise meet the eligibility criteria under §300.8(a).
- 34 C.F.R. §300.306(b)(2)

**IDEA
Disability**



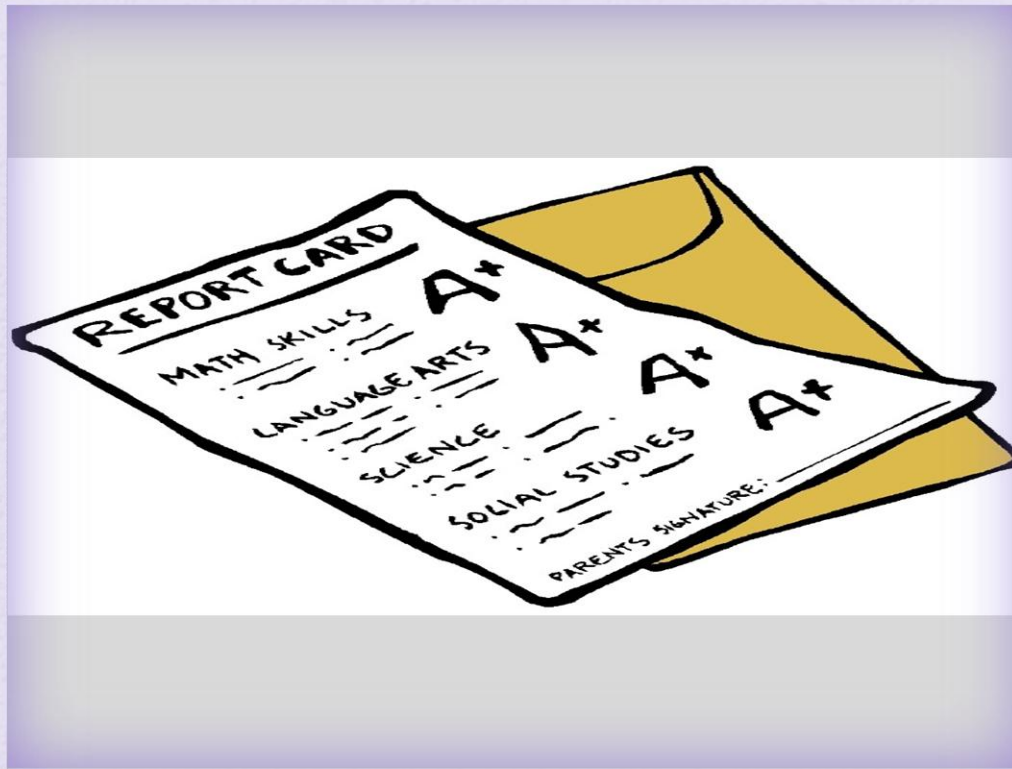
**Need for
Special Ed.**



**IDEA
Eligible**

What is FAPE?

- Eligible students have the right to receive FAPE.
- FAPE means special education and related services that –
 - Are provided at **public expense** under public direction and supervision, and **without charge**;
 - Meet the standards of the SEA;
 - Include an appropriate **preschool**, elementary school, or secondary school education in the State involved; and
 - Are provided in conformity with an IEP that meets the requirements of the regulations.
 - *See 34 C.F.R. §300.17*



Is it more than academics?

WHAT IS “SPECIALLY DESIGNED
INSTRUCTION?”

More Than Academics

- The unique needs of a student with a disability encompass more than a mastery of academic subjects. Unique needs are broadly construed to include academic, social, health, emotional, physical and vocational needs, all as relating to the provision of preschool, elementary and secondary education services.
- *See County of San Diego v. California Special Education Hearing Office*, 24 IDELR 756 (9th Cir. 1996).

Regular Classroom

- “Whether a student's disability ‘adversely affects’ his ‘educational performance’ refers to the student's ability to perform in a regular classroom designed for non-handicapped students.
- *State of Hawaii, Dept. of Educ. v. Zachary B.*, 52 IDELR 213 (D. Haw. 2009).

What is FAPE for a Preschool Child?

- FAPE includes an appropriate preschool program.
 - *See 34 C.F.R. §300.17*
- *OSEP has observed that districts must fund private preschool placements if no appropriate public program is available.*
- *“Because many LEAs do not offer preschool programs, LEAs often make FAPE available to a preschool child in a private school or facility.”*
 - *See Letter to Anonymous, 50 IDELR 229 (OSEP 2008).*

When Must FAPE be Provided?

- The right to FAPE for a child with a disability eligible under Part B begins at age 3.
- An IEP (or IFSP if available) must be in place no later than the child's third birthday.
- If a child's third birthday occurs during the summer, the child's IEP team shall determine the date when services will begin.
- *See 34 C.F.R. §300.101(b)*

OSEP Guidance

- OSEP's website: <http://idea.ed.gov>
- OSEP's Q & A on Early Childhood Transition released December 1, 2009.
 - How does the requirement under IDEA section 636(a)(3) and (d)(8) to include appropriate transition steps and services on the IFSP relate to the requirement to develop a transition plan?
 - Must the lead agency hold the IFSP meeting to develop the transition plan under IDEA section 637(a)(9)(C) at the same time as the transition conference?
 - How are families of toddlers with disabilities included in the transition plans?
 - What is the IFSP team's responsibility in reviewing program options for the toddler with a disability?
 - Must the LEA representative attend the transition conference in order for the lead agency to meet its responsibilities, under IDEA section 637(a)(9)(A)(ii)(II), to conduct the transition conference at least 90 days prior to the child's third birthday for children potentially eligible under Part B and for reporting purposes?

Where Must FAPE be Provided?



Least Restrictive Environment

Part B

- Each public agency must ensure that-
 - To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

Least Restrictive Environment

Part B

- Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
- See 34 C.F.R. §300.114(a)(2)

Continuum of Placements

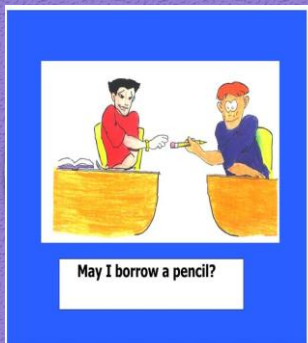
Part B

- Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.
- *See 34 C.F.R. §300.115(a)*

The LRE Continuum



Regular
Classes



Separate
Classes



Separate
Schools



Residential
Settings



Hospital or
Homebound

The Least Restrictive Environment!

Placements

34 C.F.R. §300.116

- In determining the educational placement of a child with a disability, **including a preschool child with a disability**, each public agency must ensure that the placement decision –
- Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
- **Is made in conformity with the LRE provisions;**

Placements

34 C.F.R. §300.116

- Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- A child with a disability is not removed from education in age appropriate regular classrooms solely because of needed modifications in the general education curriculum.

“To the Maximum Extent Appropriate”

- Stated another way
 - The State must have a continuum of services available for infants, toddlers, and preschoolers.
 - Decisions regarding environment must be based on the child’s needs.
 - Services must be delivered in the least restrictive environment appropriate to meet the child’s needs.

Your Starting Point

- Placement discussion always begin with the least restrictive environment.
- The team must justify why the least restrictive environment is not appropriate.



Your Ending Point

- The team must decide!





Relevant Case Law

LRE an Individual Determination

- *L.B. and J.B. v. Nebo School District*, 41 IDELR 206 (10th Cir. 2004).
 - The Tenth Circuit determined the district's placement violated the LRE requirement.
 - The Court ordered tuition reimbursement.
 - Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements.

The Nebo Case

- In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate.

The Test in the Tenth Circuit

- Determine whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and
- If not, determine if the school district has mainstreamed the child to the maximum extent appropriate.

Quoting Daniel R.R. v. Bd. of Educ., 874 F.2d 1026, 1048 (5th Cir. 1989)

Preschool LRE

- *R.H. v. Plano Independent Sch. Dist.*, 54 IDELR 211 (5th Cir. 2010).
- The fact that a district's preschool program included children with disabilities as well as typically developing children did not make it an inappropriate placement for a 4 year old with autism and a speech language impairment.
- The IEP team decided against the private general education preschool program requested by the parents because it didn't believe the school could implement the child's IEP without the district's supervision.
- The district considered placing the student in a fully mainstreamed environment, but rejected that option.
- This court did not interpret *Daniel R.R.* to require a private school placement.

Preschool LRE

- *Madison Met. Sch. Dist. v. Teresa R.*, 51 IDELR 269 (W.D. Wis. 2009).
- The district argued that enrollment in the private preschool was parent choice.
- The court disagreed. The child's IEP team determined that the child required a setting with typically developing peers in order to receive an educational benefit.
- The district played a "semantics game" by agreeing that the preschool placement was appropriate and then characterizing it as a unilateral placement for which it bore no responsibility. "The [IDEA] was not intended to reward such games."
- Once the IEP team decided that a placement with typically developing peers was necessary, the district had an obligation to provide that placement at no cost.

The Madison Case

- The student's part-time enrollment at the Little Red Preschool was a necessary component for providing him a free appropriate public education in the least restrictive environment.
- Thus, the District was responsible for paying the cost of his part-time enrollment.
- The Seventh Circuit makes clear that the actual or particular school or location where a child will receive his educational services is an element of a proper education placement.
- In fact, in some circumstances, the location determination is a critical element of the education placement determination.
- Therefore, the administrative law judge correctly addressed physical placement or location as a critical element of the student's overall educational placement determination.

How Specific Must the IEP Be?

- *J.S. v. State of Hawaii, Dept. of Ed., 110 LRP 34110 (D. Hawaii 2010).*
- The phrase “inclusion preschool,” along with a description of how much time a 3 year old with pervasive developmental disorder would be removed from a general education class, adequately described her placement.
- The physical location where a placement will be implemented is an administrative decision, not a required component of an IEP.
- The court also rejected the parents’ contention that the IEP was too vague.
- An IEP must only include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the general education class and in extracurricular and nonacademic activities.

Reimbursement for Parent Time?

- **YES.** *Bucks County Department of Mental Health v. Commonwealth of Pennsylvania*, 41 IDELR 233 (3rd Cir. 2004).
 - We hold that . . . where a trained service provider was not available and the parent stepped in to learn and perform the duties of a trained service provider, reimbursing the parent for her time spent in providing therapy is “appropriate” relief.

Bucks County Case

- The level of parental involvement Congress intended when a state meets its burden of providing appropriate early intervention services is entirely separate from what Congress intended as a remedy when a state fails to meet that burden.

Bucks County Case

- The child's mother “stepped into the shoes of the therapist,” ultimately acting over and above what is expected of parents under the IDEA.
- Limiting reimbursement to out-of-pocket expenses would give a narrow construction to “appropriate,” contrary to the Supreme Court's broad interpretation.

Is a District Required to Create a Preschool?

- **NO.** *Board of Educ. of LaGrange Sch. Dist. No. 105 v. Illinois State Board of Educ.*, 30 IDELR 891, 184 F.3d 912 (7th Cir. 1999).
- Public agencies that do not operate programs for nondisabled children are not required to initiate such programs to satisfy the requirements regarding placement in the LRE.
- For these public agencies, some alternative methods for meeting the requirements include
 - (1) Providing opportunities for participation (even part time) of preschool children with disabilities in other preschool programs operated by public agencies (such as Head Start);

No Requirement to Create a Preschool

- (2) Placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
 - (3) Locating classes for preschool children with disabilities in regular elementary schools.
-
- *See also Letter to Anonymous, 50 IDELR 229 (OSEP 2008).*
 - *See also Letter to Neveldine, 22 IDELR 630 (OSEP 1995).*

How Many Nondisabled Peers Are Required?

- **NO Certain Number.** *R.H. v. Plano Indep. Sch. Dist.*, 50 IDELR 8 (E.D. Tex. 2008) *aff'd* 54 IDELR 211 (5th Cir. 2010).
 - The placement identified in the child's IEP was a public preschool that served nondisabled students as well as students with disabilities.
 - The child's private preschool served a greater percentage of typically developing students. U.S. Magistrate explained that the relative percentage of students with disabilities in each classroom was irrelevant to the LRE analysis.
 - "There is no magic number of nondisabled peers a classroom must have in order to satisfy the IDEA."

Does the IEP Team Include the Preschool Teacher?

- **Yes.** *S.B. v. Pomona Unified Sch. Dist.*, 50 IDELR 72 (C.D. Cal. 2008).
- The IDEA requires an IEP team to include at least one regular education teacher of the child if it is possible that the child will participate in the regular education environment.
- However, the IDEA defines FAPE to include an appropriate preschool environment.
- The court ruled that the IDEA requires the district to include the child's preschool teacher on his IEP team.

Also in Our Region

- *Rio Rancho Public Schools*, 5 ECLPR 48 (NM SEA 2007).
 - The federal regulations extend the LRE requirement to preschool children with a disability, and explicitly require that the placement of a preschool child be made in conformity with the LRE provisions.
 - Offering a preschool placement in a special education class violated the District's obligation to provide FAPE in the LRE.

OSEP Guidance



Transportation

- OSEP Q & A, *Serving Children with Disabilities Eligible for Transportation*, released November 2009.
- Question F-1: When is an LEA obligated to provide transportation for a preschool child with a disability between private day care and the child's preschool?
- Answer: If the IEP Team determines that transportation is required to assist the preschool child to benefit from special education, and includes transportation as a related service on the child's IEP, the LEA would be responsible for providing the transportation to and from the setting where the special education and related services are provided.
- Authority: Transportation is included as a related service under the regulations in 34 C.F.R. §300.34(a) and (c)(16).

Paying for Private Preschool

- Letter to Neveldine, 22 IDELR 630 (OSEP 1995).
 - Further, when the public agency places a child in a private preschool program for the purpose of receiving FAPE, the child's entire educational program during the time the child is placed by the public agency must be provided at no cost to the parent.

Full Continuum of Services

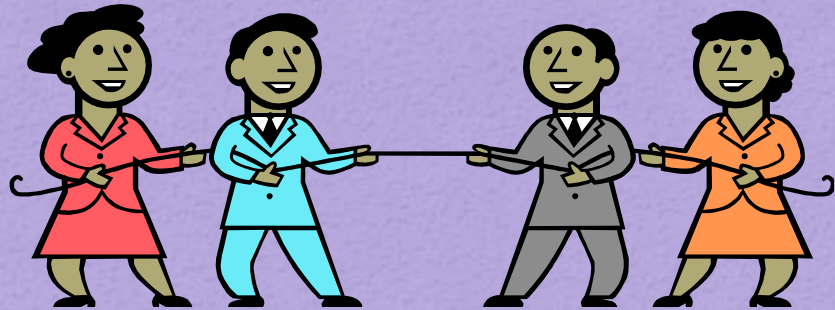
- Letter to Hirsch, 44 IDELR 194 (OSEP 2005).
 - The full continuum of alternative placements at 34 C.F.R. 300.551, including integrated placement options, such as community based settings with typically developing peers, must be available to preschool children with disabilities.

Does Stay-Put Apply From C to B?

IT DEPENDS.

Compare the next series of cases. They represent a split in our Circuit Courts of Appeal.

11th Circuit vs. 3rd Circuit



Does Stay-Put Apply?

- **NO.** *D.P. and K.P. v. School Board of Broward County*, 47 IDELR 181, (11th Cir. 2007).
 - The Court ruled against parent's bid to continue early intervention services for three year old triplets' transition from Part C to Part B.
 - The stay-put provision provides two mutually exclusive placement alternatives:
 - A child shall remain in his then-current educational placement, **or**
 - If he is applying for initial admission to a public school, the student shall be placed in a public school program with the parents consent until due process proceedings are complete.

Does Stay-Put Apply?

- *M.M. v. New York City Dept. of Ed.*, 51 IDELR 128 (S.D. N.Y. 2008).
- The District Court held that the IDEA's stay-put provision does not apply to IFSPs.
- The Court agreed with OSEP that district have no obligation to fund Part C services when a parent disputes services to be provided under Part B.

VS.



Does Stay-Put Apply?

- **YES.** *Pardini v. Allegheny Intermediate Unit*, 44 IDELR 30 (3rd Cir. 2005).
- The 3rd Circuit reversed the district court, holding that Congress understood there would be significant overlap between Part B and C when a child transitions between the two.
- The legislative intent of stay-put was to provide for a “smooth transition” from one placement to another, including Part C to B.
- Therefore, stay-put applied.

Does Stay-Put Apply?

- *Zoe M. v. Blessing*, 52 IDELR 184 (D.C. Ariz. 2009).
- Stay put applies during pending administrative or judicial proceedings, preventing the agency from unilaterally changing or discontinuing a child's services.

Does Stay-Put Apply?

- *Case by Case v. Allegheny Intermediate Unit*, 48 IDELR 130 (W.D. Pa. 2007).
 - The district court determined that the district's failure to continue the child's early intervention services violated the IDEA's stay-put provision.
 - The stay-put provision found in Part B applies to services provided under Part C.
 - The stay-put provision applies to the services the child was receiving when the parents seek a due process hearing.

Does Stay-Put Apply?

- *R.C. and S.C. v. Carmel Cent. Sch. Dist.*, 48 IDELR 71 (S.D. N.Y. 2007).
 - Although the case was dismissed for failure to exhaust administrative remedies, the district court predicted that the 2nd Circuit would join the 3rd Circuit in holding that the IDEA's stay-put provision applies to IFSPs.

Does Stay-Put Include Service Providers?

- *Joshua A. v. Rocklin Unified Sch. Dist.*, 48 IDELR 187 (E.D. Cal. 2007), *aff'd* 52 IDELR 1 (9th Cir. 2009).
 - The district court ordered the district to continue services with the current providers as the “stay-put” program for the student.
 - Altering the service provider would require the child to change from one program to another.

OSEP Guidance

- Letter to Foreman, 48 IDELR 285 (OSEP 2007).
 - Consistent with *Letter to Zahorchak*, districts have no obligation to provide Part C services to children beyond the age of three. However, districts can continue to provide Part C services during a pending administrative or judicial proceeding if they choose to do so.

OSEP Guidance

- Letter to Zahorchak, 48 IDELR 135 (OSEP 2007).
 - Noting its belief that the IDEA's stay-put provision does not apply to services provided under Part C, OSEP nevertheless advised states to seek legal advice before deciding not to continue a child's early intervention services in light of the 3rd Circuit's ruling in *Pardini*.
 - In *Pardini*, the court specifically rejected the Department of Education's opinion that stay-put does not apply to children transitioning from Part C to B.

OSEP Guidance

- Letter to Klebanoff, 28 IDELR 478 (1997).
 - If a dispute arises about a child's initial public school program, **the stay-put placement is the public school program**, not the early intervention program the child participated in under Part H (now Part C).



Questions?

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